

Tentative Rulings for September 2, 2015
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG01543 *Koosharem, LLC v. Alexander* Dept. 501

13CECG03131 *Susan Ramsey vs. St. Agnes Occupational Health Center* Dept. 501

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG03502 *Chun & Lau, Inc. v. Travelers Casualty and Surety Company of America* (Dept. 402) [Hearing on motions for summary judgment is continued to September 15, 2015, at 3:30 p.m. in Dept. 402]

14CECG02703 *Anguiano v. Deutsche Bank National Trust Company et al.* (Dept. 501) [Hearing on Demurrer and Motion to Strike is continued to September 23, 2015 at 3:30 p.m. in Dept. 501]

13CECG03980 *Leonel Valencia vs. H/S Development* [Hearing on Motion to Intervene continued to September 9, 2015, at 3:30 p.m. in Dept. 503]

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(23)

Tentative Ruling

Re: **Bruce Haney v. R. Aguirre**
Superior Court No. 07CECG03665

Hearing Date: Wednesday, September 2, 2015 (**Dept. 402**)

Motion: Defendants R. Aguirre's and D. Carlson's Motion for Mandatory Dismissal for Failure to Bring Action to Trial Within Five Years

Tentative Ruling:

To GRANT Defendants R. Aguirre's and D. Carlson's motion for mandatory dismissal for failure to bring action to trial within five years. (Code Civ. Proc., §§ 583.310 and 583.360, subd. (a).)

Defendants are ordered to submit to this Court, within 5 days of service of the minute order, a judgment of dismissal consistent with this Court's ruling on Defendants' motion for mandatory dismissal.

Oral argument on this matter is continued to Wednesday, September 16, 2015 at 3:30 p.m. in Dept. 402 so that Plaintiff Bruce Haney may be present for oral argument via CourtCall.

Explanation:

Defendants R. Aguirre and D. Carlson ("Defendants") move to dismiss Plaintiff Bruce Haney's ("Plaintiff") action on the ground that Plaintiff has failed to bring this case to trial within 5 years.

" 'An action shall be brought to trial within five years after the action is commenced against the defendant.' (§ 583.310.) An action which is not brought within the prescribed period must be dismissed. (§ 583.360, subd. (a).) These requirements are mandatory 'and are not subject to extension, excuse, or exception except as expressly provided by statute.' (§ 583.360, subd. (b).)" (*Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co.* (1994) 24 Cal.App.4th 247, 251.)

First, this action was commenced against Defendant R. Aguirre when Plaintiff filed his original complaint on October 30, 2007 and was commenced against Defendant D. Carlson when Plaintiff filed his first amended complaint on March 26, 2008. Second, 2 years, 2 months, and 11 days must be excluded from the computation of the time that this action has elapsed because all proceedings in this action were stayed from March 11, 2010 to May 22, 2012. (Code Civ. Proc., § 583.340, subd. (b) ["In computing the time within which an action must be brought to trial ..., there shall be

excluded the time during which any of the following conditions existed: ... (b) Prosecution or trial of the action was stayed or enjoined.”].) Third, Plaintiff has failed to present the Court with any evidence demonstrating that any other amount of time should be excluded from the computation of the statutory 5-year period under the exceptions in Code of Civil Procedure section 583.340.

Therefore, initially, as to Defendant R. Aguirre, the 5-year statutory period commenced running on October 30, 2007 and, since the 5-year period was tolled for 2 years, 2 months, and 11 days while this action was stayed, the 5-year period lapsed on Saturday, January 10, 2015. As Saturdays are holidays under Code of Civil Procedure section 12a, the 5-year period was extended to the next court day, or, Monday, January 12, 2015. (*Holland v. Dave Altman's R.V. Center* (1990) 222 Cal.App.3d 477, 480, fn. 4.) Further, as to Defendant D. Carlson, the 5-year statutory period commenced running on March 26, 2008 and, since the 5-year period was tolled for 2 years, 2 months, and 11 days while this action was stayed, the 5-year period lapsed on Monday, June 8, 2015, since Saturday, June 6, 2015 is a holiday. (*Ibid.*)

Accordingly, since the 5-year period as to both Defendants R. Aguirre and D. Carlson has lapsed and this action has not been brought to trial, the Court grants Defendants' motion to dismiss pursuant to Code of Civil Procedure sections 583.310 and 583.360, subdivision (a).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 9/1/15
(Judge's initials) (Date)

Tentative Rulings for Department 403

(28)

Tentative Ruling

Re: **Amtrust Financial Services, Inc., et al. v. Strausser Construction, Inc., et al.**

Case No. 15CECG00811

Hearing Date: September 2, 2015 (Dept. 403)

Motion: By Plaintiff and Cross-Defendant Amtrust Financial Services as administrator of Preserver Insurance Co. demurring to First Amended Cross-Complaint of Strausser Construction, Inc.; Motion to Strike First Amended Cross-Complaint, or Portions Thereof.

Tentative Ruling:

To overrule the demurrer and deny the motion to strike. Cross-Defendant shall have ten days to respond to the First Amended Cross-Complaint.

Explanation:

Demurrer

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.)

A demurrer for uncertainty will be sustained only where the complaint is so poorly drafted that defendant cannot reasonably respond. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Amtrust is correct that the FACC is not a model of clarity: Cross-Complainant does not name the "Cross-Complainant" in the body of the FACC and the FACC is riddled with formatting and grammatical errors. Nevertheless, the FACC contains enough facts to enable the cross-defendants to ascertain the issues they are being asked to meet. (*Cf. Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn.2 ("Although inconvenient, annoying and inconsiderate, the lack of labels does not substantially impair (defendant's) ability to understand the complaint."))

Here, the First Amended Cross-Complaint does contain allegations that Amtrust claims to be standing in for Preserver (FACC ¶2), and that Preserver breached its contract with Cross-Complainant by overcharging Cross-Complainant (FACC ¶¶5-7).

That Strausser is the Cross-Complainant can be ascertained from the caption on the First Amended Cross-Complaint itself.

A written contract must be pleaded either in haec verba (word for word), by attaching a copy of the writing as an exhibit, or "according to its legal intendment and effect" by alleging its essential terms and conditions. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199.) A complaint must, therefore, plead a prima facie right to relief. (*Ibid.* (ruling sustaining demurrer reversed on appeal where complaint alleged an insurance policy obligated insurer to defend and indemnify against suits seeking damages and that the subject claim fell within the scope of the insurance agreement).) Here, the First Amended Cross-Complaint does allege the bases for the breach of contract claim: there was a contract, and Preserver "breached the agreement by performing an inaccurate audit including calculating the cost with the experience modification rating (ex-mod) at 1.32 when it should have been .88, and the failing [sic] to revise that calculation . . . and . . . by failing and refusing the Cross-Complainant's request for an accurate audit to be conducted and the premium to be adjusted to the actual amount owed." (FACC ¶6, lines 7-12.) This adequately alleges a contract, a breach, and resulting damages sufficient to put Cross-Defendants on notice. Therefore, for all of these reasons, the demurrer is overruled.

Motion to Strike

The motion to strike the entire First Amended Cross-Complaint on the grounds of uncertainty is denied for the reasons discussed above.

Amtrust moves to strike the request for attorney's fees on the grounds that the First Amended Cross-Complaint does not contain a legal basis for the fees. However, Cross-Complainant does allege that the insurance contract contains such a provision, which is sufficient for pleading purposes. (*Construction Protective Services, supra*, 29 Cal.4th at 198-199 (prima facie pleading of relief is all that is required to survive demurrer).) Therefore, the motion to strike is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 08/31/15.
(Judge's initials) (Date)

Tentative Ruling

Re: **Kreidel v. County of San Bernardino**
Superior Court Case No. 14CECG03262

Hearing Date: **September 2, 2015 (Dept. 403)**

Motions: Demurrer to the Complaint

Tentative Ruling:

To Sustain the demurrer to the complaint with leave to amend. (Code Civ. Proc. Sect. 430.10, Subd. (e).) Plaintiff is granted 30 days' leave to file the first amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Where the complaint fails to plead ultimate facts establishing a cause of action, the complaint is subject to a demurrer. (Code of Civil Procedure § 430.10(e); *Berger v. California Ins. Guar. Ass'n* (2005) 128 Cal.App.4th 989, 1006.) Additionally, "[s]ince the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified." (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802.) Lastly, the plaintiff generally has six months to file the complaint after the claim has been rejected by subject public entity. (Government Code §§ 913, 945.6; *K.J. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1238.)

In this case, the complaint does not direct any allegations toward the County of San Bernardino. The County of San Bernardino is not alleged to have acted in any way. Moreover, there is no statute cited as basis for public entity liability. Lastly, the events identified in the complaint allegedly occurred in 2010 and thus appear to be time barred under Government Code §§ 913 and 945.6. The demurrer is sustained.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 09/01/15.
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: ***In re Nicholas Her***
Superior Court Case No. 15CECG02168

Hearing Date: September 2, 2015 (Dept. 502)

Motion: Petitions to Compromise Minors' Claims

Tentative Ruling:

To deny without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition has been brought by the father in pro per. This is not permissible. Father may not represent the minor. A nonattorney appointed as guardian ad litem cannot act in pro per. Doing so would constitute the unlawful practice of law. Bus. & Prof.C. § 6125 and **J.W. v. Sup.Ct.**, (1993) 17 CA4th 958, 965.

Pursuant to Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 8-26-15.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Wells Fargo Equipment Finance, Inc. v. Central Valley Presort***
Court Case No. 15CECG01837

Hearing Date: **September 2, 2015 (Dept. 502)**

Motion: 1) Plaintiff's Applications for Writs of Attachment as to defendants
Eric L. Kozlowski, Central Valley Presort, Inc., and Integrated
Voting Solutions, Inc.
2) Plaintiff's Application for Writ of Possession as to Defendant
Central Valley Presort, Inc.

Tentative Ruling:

To grant all applications for Writs of Attachment and Writ of Possession. The plaintiff's bond on each Writ of Attachment is set at \$10,000. The defendant's bond which defendant Central Valley Presort is required to post in order to prevent plaintiff from taking or regaining the property is set at \$230,000.00. (Code Civ. Proc. § 515.020.) The court will sign the orders presented.

Explanation:

All defendants were personally served with notice of these applications, and did not oppose them or file claims of exemption.

Attachment:

Plaintiff establishes that this claim is one on which an attachment may be issued by Mr. Mulgrew's declaration showing that this claim is for money based on an express contract, of a fixed or readily ascertainable amount not less than \$500, that the debt is not secured by real property, and that it is a commercial claim. (Code Civ. Proc. § 483.010; *Goldstein v. Barak Const.* (2008) 164 Cal.App.4th 845, 851.) The costs and attorney fees included in the amount sought to be attached appear reasonable. Plaintiff has established the probable validity of its claim. Plaintiff has provided sufficient evidence to conclude as to the individual defendant guarantor that the claim arises out of the conduct by defendant of a trade, business, or profession. (See *Advance Transformer Co. v. Superior Court* (1974) 44 Cal.App.3d 127, 144.)

Possession:

The request for possession is properly based on a cause of action for claim and delivery. The property is sufficiently described. (Code Civ. Proc. § 512.010(a).) Plaintiff has adequately established its right to possession of this property. It has sufficiently described its location. Defendant Central Valley Presort was personally served with notice of this motion, and did not file any opposition to it. From the evidence presented, it appears that the value of the property is less than the amount defendant owes under the contract related to this property, such that defendant's interest in it is valued at \$0.

Therefore, the plaintiff's bond requirement is waived. (Code Civ. Proc. § 515.010, subd. (b).) Defendant's bond is properly set at \$230,000.00. (Code Civ. Proc. § 515.020.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 9-1-15.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(2)

Tentative Ruling

Re: **Marquez v. Scheppegrell**
Superior Court Case No. 13CECG00460

Hearing Date: September 2, 2015 (Dept. 503)

Motion: Compel response to supplemental interrogatories, set one, supplemental request for production of documents, set one and sanctions

Tentative Ruling:

To grant Defendants' motions to compel Plaintiff to provide verified responses to supplemental interrogatories, set one and supplemental request for production of documents, set one. (Code of Civil Procedure sections 2030.290(b), 2031.300(b).) Plaintiff to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant Defendants' motion for sanctions. George Marquez is ordered to pay monetary sanctions to the law offices of Stammer, McKnight, Barnum & Bailey LLP in the amount of \$262.50 within 30 days after service of this order. CCP §§2030.290(c), 2031.300(c).

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 8-28-15 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: **Orange Cove Full Gospel Temple v. Leeper**
Superior Court Case No. 14CECG03480 consolidated with
14CECL09000

Hearing Date: **September 2, 2015 (Dept. 503)**

Motion: Plaintiff's motion for leave to file a third amended complaint

Tentative Ruling:

To grant, with conditions. The moving party is granted 10 days leave to file the Third Amended Complaint. Plaintiff has 45 days from September 2, 2015 to serve The Full Gospel Conference of the World with the Third Amended Complaint and Summons. A status hearing is scheduled for Wednesday November 4, 2015 at 3:30 pm in Dept. 503. The trial date is vacated.

Explanation:

The court is allowed broad discretion in permitting the parties to amend their pleadings. (Code of Civil Procedure §§ 473(a)(1), 576.) Essentially, "[i]f the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend . . ." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Also, where some prejudice is shown, the court may grant amendment but impose conditions. (Weil & Brown, *supra*, 6:663, pg. 6-169, citing CCP §§ 473(a)(1), 576 ["[t]he court is authorized to grant leave ' . . . on such terms as may be proper . . .'"].)

Here, the new cause of action is specifically directed at the relationship between Defendant Timothy L. Leeper and the encompassing church organization:

Plaintiff desires a judicial determination of its rights and duties, a declaration that Defendant Timothy L. Leeper is bound by the determination of the CONFERENCE, and a declaration as to the validity of Defendant Timothy L. Leeper's actions as alleged.

Proposed Third Amended Complaint, ¶ 32.

However, the encompassing church organization is not a party to the case. Essentially, it does not appear that complete relief can be determined without the presentation of the organization's position regarding their relationship with Mr. Leeper. Accordingly, the CONFERENCE shall be joined as a condition of amendment. (CCP §§ 576, 389(a).) Lastly, by adding a cause of action which involves an additional party, the plaintiff has added to the complexity of the case. Accordingly, a trial continuance is also a reasonable condition to amendment.

Issued By: A.M. Simpson on 9-1-15.
(Judge's initials) (Date)